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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Statement of interest*

Amicus the National Association for the Advancement of Colored People (N.A.A.C.P.) is the Nation's oldest, largest, and strongest civil rights organization. For more than nine decades, it has worked to promote, through peaceful means, equal education and other basic civil rights and to hasten the end of segregation and racial violence.

The N.A.A.C.P. maintains 2,200 chapters in all 50 States, the District of Columbia, and several foreign countries. Its members now number more than 500,000, and -- as has been true since its inception -- include individuals of all racial, religious, and ethnic backgrounds.

The N.A.A.C.P. and its members know first hand the critical contributions that independent, voluntary organizations make to our Nation's civic, cultural, and political life – as well as the personal satisfaction and enrichment that come from service to one's community. N.A.A.C.P. chapters are actively involved in improving the safety, health, education, and economic conditions of the communities where they are located, with special focus on improving opportunities for young people.

The interest of Amicus in and its experience with the legal issues this case presents could hardly be stronger. Were it not for this Court's readiness to acknowledge and enforce the N.A.A.C.P.'s constitutional rights of association, our organization could scarcely have survived, and its achievements – and those of its allies in the movement for African-American civil rights – would have been far fewer. As the United States Reports record, the Association weathered an unrelenting, years-long assault, undertaken by the governments of several States and motivated by intense hostility toward the objectives of

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*Consent to file this Brief has been sought and obtained from both parties. Pursuant to this Court's Rule 37.6, *Amicus* attests that no counsel for a party had any role in authoring this Brief and no outside party has made a monetary contribution for its preparation or submission.

equality and non-discrimination to which the N.A.A.C.P. and its members were committed. See, e.g., Louisiana v. N. A. A. C. P., 366 U.S. 293 (1961); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); N. A. A. C. P. v. Button, 371 U.S. 415 (1963).

No less well, however, is the N.A.A.C.P. acquainted with the individual and societal harms that have been defended under the broad banner of "privacy" and "freedom of association." It does not overstate matters to say that almost every significant civil rights victory – from the end of the white primary, Smith v. Allwright, 321 U.S. 649 (1944), to the invalidation of racially restrictive covenants, Shelley v. Kraemer, 334 U.S. 1 (1948), to the fight for desegregated schools, Green v. New Kent County Sch. Bd, 391 U.S. 430 (1968), to the fight for federal equal employment, fair housing, and public accommodations legislation, see 78 Stat. 253 – was opposed on the ground that it posed an intolerable threat to "freedom of association." See also Romer v. Evans, 515 U.S. 528, 536; cf. Brief for N.A.A.C.P. as *Amicus Curiae*, Railway Mail Ass'n v. Corsi, No. 44-631 at 20 (arguing that "voluntary associations" should be open to all, on reasonable terms).

Thus, although the Nation's progress toward equality owes much to judicial recognition of free association rights, so, too is it indebted to the refusal to accord uncritical acceptance to broad assertions of rights of privacy and association.

Although, as even Petitioners presumably would acknowledge, the perceived "threat" at issue here is different in kind from those historically directed at *Amicus*, we do not believe that the freedom of association concerns in cases such as this one are insubstantial, nor, as the Briefs filed by Petitioners and a number of their supporters in this Court seem to assume, does support for the decision below evince an underestimation of the significance of the role civic groups play in our Nation's life.

To the contrary, *Amicus* is convinced that anti-discrimination laws – and judicial review thereof – must operate with sensitivity to speech, associational, and privacy rights; but we also believe that New Jersey's law and this Court's existing doctrine meet that test. If anything, it is not underestimation, but rather our deep appreciation for the role that civic groups play in the lives of their members and their communities that impels the N.A.A.C.P. to urge this Court's adherence to its current, measured approach.

Summary of Argument

General propositions seldom decide particular cases. See Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). If this case were, as some suggest, a simple referendum on "freedom of association," "free speech," or the special importance of civic groups in American life, there is no doubt on which side *Amicus* would come down – indeed, it is hard to imagine that a credible opposition could be mustered, let alone one that could persuade a State Supreme Court to unanimous judgment. First-hand experience has confirmed both the importance of judicial protection for rights of association and the wisdom of Tocqueville's observation that there is a "necessary connection between associations and equality," A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer, ed. 1969) at 514.

But this case cannot be resolved by resort to such majestic abstractions -- nor by invocation of the contemporary bugbears of "compelled diversity" or "political correctness." Rather, this case requires the Court to traverse familiar, albeit sensitive, constitutional terrain. As in several earlier cases, see, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Runyon v. McCrary, 420 U.S. 127, 175-76 (1976), the Court is asked to review the balance struck between an entity's asserted interest in

prescribing exclusionary membership criteria and the power of the government to protect members of vulnerable groups from the sting of discrimination.

Like this case, those earlier ones were litigated at a high rhetorical pitch. It was predicted, for example, in New York State Club Association v. New York City, 487 U.S. 1 (1988), that treating large, private clubs as public accommodations would deny "millions of men and women" the benefits of civic participation and would "diminish [the] diversity and pluralism which private organizations have played such an important role in developing," Brief *Amicus Curiae* of Conference of Private Organizations, and in Hishon v. King & Spalding, 467 U.S. 69 (1984), the Court was warned that applying Title VII to a law firm partnership decision would "strike at the very hand that holds the shield against the Executive Branch of Government," Brief for Resp. at 13; cf. H. Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 33 (1959) (suggesting that Court's decision in Brown v. Board of Education impermissibly infringed white parents' rights of free association).[1]

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[1]Petitioners object to the use, in the decision below, of terms such as "prejudiced" or "bigoted" and treat those terms as evidence that the New Jersey Supreme Court's legal judgment was clouded by its animosity toward the Boy Scouts. Pet. Br. at 28, 44. This complaint is not a new one: the defendant in Jaycees took similar umbrage at being labeled a discriminator, as did the Appellant in Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Indeed, such protestations long predate those cases, see, e.g., Plessey v. Ferguson, 163 U.S. 537, 551 (1896) (asserting that plaintiff had no basis for assuming that forced racial separation "stamped the colored race with the badge of inferiority"). The insistence that telling a gay child – or the child of a gay parents – that all homosexuals, including individuals the organization had formerly seen fit to elevate to the rank of Eagle Scout, are morally "[un]clean" is not "anti-gay," Pet. Br. at 46, evinces that same sort

But experience teaches not only that these dire predictions are overdrawn but that the very parties who (unsuccessfully) advanced them have subsequently flourished.[2] This fact is itself a testament to the soundness of this Court's decisions in this area – to (1) their evident respect for the important values on both sides; (2) their care to distinguish between what was truly fundamental and what was bluster; and (3) their admonition that courts confronting demands for exemptions from anti-discrimination laws pay close attention to the particular facts involved, see, e.g., Roberts, 468 U.S. at 620.

Indeed, as much as *Amicus* recognizes the unique role that independent, civic institutions play and the ways in which our national life would be impoverished were the vitality of this sector to be impaired, we respectfully submit that the dangers this case poses all fall on the other side of the ledger. Simply put, Petitioners here do not ask the Court to correct a lower court's misapplication of controlling doctrine: they seek to re-write the legal standards established by this Court's decision in Roberts and its progeny, replacing the nuanced and fact-intensive inquiries called for in those cases with what would essentially be

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of blindness. Although the First Amendment protects Petitioners' freedom to think and say "'hurtful'" things, id. at 25 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 574 (1995)Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 574 (1995)), it does not require a court to accept a litigant's assertion which is, as a matter of New Jersey law and plain English, prejudice, see Wesbster's New World Dictionary, Second College Edition (1980) at 1122 is, in fact, "respect." Pet. Br. at 47.

[2]Cf. http://www.lawnews.net/lawfirms/surveys/1999AmLaw200.html (noting that defendant in Hishon case had $231 million in annual revenues, reflecting a 20.9% annual rate).

a carte blanche for discrimination by non-governmental actors.[3] Such a departure is neither necessary nor consistent with broader First Amendment principles -- or with this Court's many important anti-discrimination precedents -- and it would needlessly hamper the efforts of State and local governments to secure for all their citizens equal opportunity.

Amicus does not agree, moreover, that a constitutional line should be drawn between commercial and noncommercial entities, whereby the latter would enjoy an absolute immunity under anti-discrimination laws. First, as important as private associations may loom in the contemplation of the First Amendment, the text, structure, and history of the Constitution foreclose the assertion that they have a greater claim to special protection than do university faculties, the press, or labor unions -- all of whom have been subject (over vigorous protest) to civil rights statutes -- as well as to other laws of general applicability, see, e.g., E.E.O.C. v. University of Pennsylvania, 493 U.S. 182 (1990); Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973); see also Bob Jones; see generally Associated Press v. NLRB, 301 U.S. 103, 130 (1937). Indeed, if the right to select associates is treated as uniquely determinative of the voice with which an entity speaks, it is hardly clear that the First Amendment could tolerate a distinction between profit-making and not-for-profit entities, First Nat. Bank v. Bellotti, 435 U.S. 765, 784 (1978).

Such a standard, moreover, would not do justice to the values on either side of the equation: the intensity, duration, and interdependence of a person's relationship with a law partner,

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[3]Indeed, it is telling that Petitioners' Brief barely attempts to parse the opinion of the five-Justice majority in Roberts, instead treating a concurring opinion as if it stated the case's holding, see Pet. Br. at 34.

see Hishon , 467 U.S. at 78, can often exceed that experienced with a fellow member of a social club or boy scout troop, and the seriousness of the tangible and intangible harms flowing from being denied access to educational or other non-commercial opportunities can far exceed those which attend being denied access to a "motion picture house . . . or other place of exhibition or entertainment," 42 U.S.C. § 2000a(3).

By contrast, the current legal regime, where laws like New Jersey's, whose application depends primarily on the manner and extent to which an organization holds itself out to the public, are tested under a standard that looks to the actual substance of the allegedly unconstitutional imposition, is more apt to home in on the important constitutional values on both sides.

ARGUMENT

I. The Existing Framework Provides Strong Protection for Associational Interests

A. The Need for a Balance

Petitioners and their *amici* contended that the First Amendment cannot countenance the sort of vigorous application of anti-discrimination protections at issue here, i.e., that the very benefits of civic involvement that contribute so powerfully to the vitality of American political life would be jeopardized if a State could forbid an organization such as BSA from relying on legislatively proscribed criteria in making membership decisions. A decision upholding the New Jersey Supreme Court, Petitioners and their *amici* warn, risks dooming the pluralism and diversity that so enrich the Nation and consigning its voluntary associations to a dreary homogeneity. See Pet. Br. at 19-20.

Petitioners respectfully submit that the stakes are not nearly so high. Experience shows that the benefits of free

association and those of equal treatment are far more compatible in practice than they may be made to look in theory. Where tensions do arise, the present approach, as embodied in statutes like New Jersey's and decisions like Roberts, provides needed safeguards for interests of privacy and expression without stinting the important values on either side.

1. The Importance of Private Associations

There is much in the Brief of Petitioners and those of its *amici* with which we could not disagree. At the outset, we must acknowledge the pivotal role that judicial recognition of associational freedom played in enabling individuals historically subject to class-based discrimination to push to make our Union a "more perfect" one, United States v. Virginia, 518 U.S. 515, 558 (1996); N.A.A.C.P. v. Alabama. In times of unrelenting governmental hostility, voluntary associations, sheltered by the First Amendment, have proved an important -- and often the only -- reliable refuge.

And it should be apparent to the point of being subject to judicial notice that volunteer groups play a unique and salutary role in the political, cultural, religious, and civic life of the Nation. An estimated 82 percent of Americans belong to at least one voluntary association, with the average person belonging to 4.1; over 109 million American adults volunteered in 1998, committing a total of 19.9 billion hours – the equivalent of a full-time work force of 9 million – contributing an estimated $225 billion. In this regard, *Amicus* takes just pride in its contributions: local N.A.A.C.P. chapters sponsor educational, job training, and public health initiatives that make a real difference in young people's lives.

This propensity to establish and join associations, this Court has recognized, is indicative of an important strand of the American national character. And this Court's cases, echoing

Tocqueville's famous observations, have highlighted the close links between private civic activism and the health and vitality of the Republic.

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.

Roberts, 468 U.S. at 618-19.

Finally, the rewards of civic activism do not redound only to the common weal. N.A.A.C.P. members and other Americans who participate in voluntary associations, service organizations, and clubs derive immense personal satisfaction from those activities.

2. The Anti-Discrimination Principle

This case arises out of the efforts of the people of New Jersey to secure these important benefits for all of its people, irrespective of their race, ethnicity, gender, religious background, or sexual orientation. Although the anti-discrimination principle – the proposition that it is wrong to treat a person simply as a member of a disfavored group, rather than judging him or her on individual talents – took far longer to take root in our Nation's constitutional tradition, see, e.g., J.E.B. v. Alabama ex Rel. T.B., 511 U.S. 127 (1994), it is now a permanent fixture.[4] Acts of

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[4]Indeed, Democracy in America itself reminds how late recognition of this truth was in coming. Speaking of the relative status of men and women in the United States, Tocqueville condemned those who would

> attribute the same functions to both [sexes], impose the same duties; [and] have them share everything – work, pleasure, public

invidious exclusion, it is now recognized, can cause grave personal harm, see, e.g., United States v. Burke, 504 U.S. 229, 238 (1992), and, as is true of the benefits of free association, these harms ramify far beyond the individual. Thus, the New Jersey Legislature concluded in enacting the statute at issue in this case, "Discrimination threatens not only the rights and privileges of the inhabitants of [the State], but menaces the institutions and foundations of a free democratic State" N.J.Stat. Ann. 10:5-3.

B. The Present Framework

1. Constitutional Protection of Expressive Association

As has already been noted, every effort to extend the ambit of the anti-discrimination principle has met concerns – often sincerely held, but just as often, badly overstated – that fundamental freedoms would be compromised. Although this Court has met the most overwrought of these contentions with justifiable skepticism, it has also recognized that constitutional considerations can, in some situations, be substantial.

In Roberts, the Court recognized that constitutional protection for associational freedoms extends beyond the right of privacy, i.e., those especially close relationships needed in order to "independently . . . define one's identity that is central to any concept of liberty." Invoking NAACP v. Alabama, 357 U.S. 449 (1958), Roberts affirmed that the First Amendment not only protects individual speech, but also the freedom to band together for expressive purposes.

But the mere fact of a group's involvement in expressive

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affairs. It is easy to see that this sort of equality forced on both sexes degrades them both, and that so coarse a jumble of nature's works could produce nothing but feeble men and unseemly women.

DEMOCRACY IN AMERICA at 601.

activities, Roberts teaches, is not enough in itself to exempt it from regulation under anti-discrimination laws. Rather, the relevant question was whether evidence existed that enforcement of the civil rights law would "impede the organization's ability to engage in these protected activities or to disseminate its preferred views," 468 U.S. at 627. In the case of the service organization respondent, which had a "creed of promoting the interests of young men," id., Roberts refused to presume that admitting women would "require[] [a] change" in that creed, nor would it restrict the organization's ability to exclude individuals with ideologies or philosophies at odds with those of its existing members. The Court then rejected a contention that admission of women as voting members would "impair a symbolic message conveyed by the very fact that women are not permitted to vote" or that it would dampen the effectiveness of Jaycees' expression "because of the gender-based assumptions of the audience," id.[5]

Subsequent decisions have elaborated on this approach. In Board. of Dirs., Rotary Int'l v. Duarte Rotary Club, 481 U.S. 537 (1987), which again involved a challenge to application of a public accommodations statute to an all-male membership organization, the Court looked to whether the evidence in fact showed "that admitting women to Rotary Clubs [would] affect in any significant way the existing members' ability to carry out their various purposes," and concluded that the challenged California law did not require the petitioner club to "abandon or alter" its "basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."[6]

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[5]See also id. (classing anti-discrimination statutes with other laws that address harms "distinct from their communicative impact").

[6]Id at 548 (noting that "opening membership to leading business and professional women in the community," would likely "broaden[]

In disposing of a facial challenge to a law extending the reach of an anti-discrimination ordinance to large clubs, New York State Club Ass'n once more inquired whether the law would affect "'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints.'"487 U.S. at 13 (quoting Duarte, 481 U.S. at 548).

This trilogy of decisions has, in turn, been applied by numerous State and federal courts confronted with claims that particular anti-discrimination laws or applications thereof unconstitutionally impair rights of association. As would be expected, the outcomes of these cases have depended on the particular groups and statutes involved.

2. Further Safeguards

The Roberts framework is not the sole – or even the primary – source of protection for these important societal and constitutional values. While many States and localities have seen fit to broaden gradually the sweep of their anti-discrimination laws, see Roberts, 468 at 624, 626, the reach of these statutes remains subject to important limitations. See New York Club Ass'n, 487 U.S. at 18 (O'Connor, J., concurring) (finding that challenged statute was an appropriately "sensitive tool[]" for balancing interests). Statutes like New Jersey's expressly exempt from anti-discrimination obligations institutions that are "distinctly private," irrespective of the number of members, for example, and other laws apply only to entities of a particular size, see 42 U.S.C. §3603(b)(2) (so-called "Mrs. Murphy" exemption to the Fair Housing Act); id. § 2000e(b)(2) (limiting Title VII to firms with 15 or more employees).

There is great variation, as well, in the classifications that may or may not be relied upon; thus, in Massachusetts, but

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[Rotary's] capacity for service").

not in Nevada, it is impermissible to base a decision on marital status, see Mass. Gen. L. §37.2301. In other jurisdictions, certain categories of employer or landlord are placed entirely outside the regulatory framework, and in still others, the bar on considering a particular trait is less than complete. The federal laws prohibiting religion- and gender-based employment discrimination allow for reliance on those considerations when they are "bona fide occupational qualification[s]," 42 U.S.C. § 2000e-2(e)(1), and Title VII permits religious or religiously affiliated entities to distribute burdens and benefits based on religion even where the same actors' sex- or race-based discrimination would not be allowed, see 42 U.S.C. § 2000e-1.[7]

These legislatively established rules remain subject to revision through the ordinary "pull[ing]" and "haul[ing]" of the democratic process, Johnson v. Degrandy, 512 U.S. 997, 1020 (1994). See Virginia, 515 U.S. at 561 (Scalia, J., dissenting). And it might be noted that the BSA – which claims some 5 million current members, tens of millions of alumni, and the President of the United States as its Honorary President, is likely not without power in this arena. Cf. 10 U.S.C. § 2544; 16 U.S.C. § 539f (according BSA special right to use certain types of federal property).[8]

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[7]A number of States, including Mississippi, Georgia, and Alabama, have not seen fit to provide any protections against discrimination beyond those provided by Congress.

[8]Nor, of course, would BSA likely have to go it alone. As noted above, many of the more than a hundred million "joiners" in the Nation presumably would give a sympathetic ear to claims that particular laws or enforcement regimes posed an unacceptably high threat to the voluntary sector. Cf. NJ Stat. Ann. 2A:53 A7 (providing limited charitable tort immunity); Mass Gen. Laws h. 231, § 85K (limiting plaintiff's tort recovery to $20,000).

Moreover, as the Court has repeatedly emphasized, anti-discrimination laws do not deprive covered entities of the power to exclude generally or even of the power to exclude individuals who happen to be members of legislatively recognized "protected classes" – only the freedom to base exclusion decisions on characteristics that have been legislatively determined to correlate poorly with individual talent and to have operated systematically to disadvantage classes of people. See New York Club Ass'n, 481 U.S. at 13 (recognizing possibility that some association "might be able to show . . . that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex," but noting that in general, the law "merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . .more legitimate criteria for determining membership"); accord Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion) (explaining that "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice").[9]

Finally, the process self-selection itself operates a potent force. Contrary to the implication of Groucho Marx's celebrated dictum, many people do not want to be a member of a club that would not have them (at least where exclusion would be based

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[9]Ordinarily, Petitioners' contention that their actions were taken on account of Dale's "views" rather than his status, might make the issue a closer one. But Petitioners did not base their decision on Dale's actual "views" – indeed, their policy excludes "known" homosexuals, whatever their views – they inferred the objectionable "philosophy" from his sexual orientation. Even more important, the "views" attributed to Dale, i.e., that there is nothing "unclean" (as that term is used in Boy Scout law) about homosexual orientation, undeniably are held by others whom Petitioners have permitted to continue serving as leaders and sponsors of scouting.

on antipathy to his or her status or minority group membership). Cf. Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd, 578 F.2d 1122, 1127 & n.5 (5th Cir. 1978) (noting unresolved factual question whether KKK maintained racially discriminatory membership policy, noting that no African American had yet joined and that "one may well wonder why any would wish to").

In this respect, this case is an unusual one: it involves an individual whose bona fide commitment to the values of the association he seeks to join is beyond serious question, and who has a track record of discharging the responsibilities for which he is now deemed unfit – including, presumably, those relating to conveying (however obliquely) BSA's "message" as it concerns sexuality and cleanliness – to the evident satisfaction of Petitioners. And it involves an allegedly intolerable belief (imputed by Petitioners' to Dale) that Petitioners' heterosexual members – and religious and governmental sponsors – have continued to voice with far less draconian consequences.[10]

II. This Court's Decisions Offer No Support for the Broad Right to Discriminate BSA Asserts

Although Petitioners insist that their constitutional claim

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[10]Petitioners suggest that Dale's statements after filing this suit are not only relevant but are sufficient to defeat his claim of status-based discrimination, on the ground that his later words are a genie that "cannot be put back in the bottle," Pet. Br. at 29. This argument is a familiar one in anti-discrimination law and generally is resolved by placing the burden on the culpable defendant to show that the otherwise appropriate relief would be inequitable. Cf. McKennon v. Nashville Banner, 513 U.S. 352 (1995). To the extent that BSA contends that the post-expulsion statements represent his "true" purpose in seeking to participate in scouting, that is manifestly inconsistent with a ten-year involvement devoid of any sign of objection to BSA teaching.

is based on a reading of this Court's cases, the unmistakeable thrust of their argument is that the rules developed in Roberts and its progeny are insufficiently solicitous of free association considerations and not appreciative enough of the contribution that voluntary associations play in American life. But the "test" that Petitioners would install as a replacement is one that no discriminator (or at least none represented by counsel) could fail. Indeed, not only would Petitioners' version of the legal standard have yielded different results in the Roberts case and progeny, but, if seriously applied, it would distort First Amendment doctrine more generally and open a "constitutional" loophole in widely accepted anti-discrimination protections.

A. Under this Court's Cases, Discrimination is Not "Speech"

Improbably, Petitioners have chiefly claimed that it is not the Roberts line of cases – all of which dealt specifically with the interplay between voluntary associations' membership policies and State anti-discrimination law – but rather Hurley, that should supply the rule of decision for this case. Like that case, Petitioners insist, this one involves "forced speech": to require those who operate public accommodations to admit homosexuals (or African Americans, women, or disabled people, presumably) on a nondiscriminatory basis, they say, is to force those entities to "conform" their speech and beliefs to a "State-sponsored orthodoxy" on the "issue" of the propriety of equal treatment of members of that minority group. See, e.g. Pet. Br. at 22-23. Compelling BSA to admit James Dale is constitutionally no different (or, if anything, it is worse), Petitioners suggest, than was the order requiring a private parade organizer to allow a gay rights group to march in its parade.

Even in circumstances where subtle distinctions are far less critical, the analogy Petitioners advance would be a doubtful one. Setting aside the differences between a parade – which has

both the purpose and effect of communication with an audience, see Hurley, 515 U.S. at 569 (noting observation that "if a parade or demonstration receives no media coverage, it may as well not have happened'") – and an ongoing membership group such as Boy Scouts, the analytically correct parallel would be a Boston parade that: (1) had excluded all gay or even all openly gay persons, on the ground that their status conveyed a "message," compare Hurley at 572 (noting that "petitioners disclaim[ed] any intent to exclude homosexuals as such"); (2) had permitted to march non-gay groups eager to voice the same message of equal treatment irrespective of sexual orientation that GLIB was prevented from contributing; and (3) excluded GLIB members, based not on what they sought to say in the parade, but rather based on what they were assumed to believe.

The distinctions that Petitioners would brush aside – between the act of discrimination and belief in the rightness of discrimination and between a person's race, gender, or sexual orientation and her set of beliefs on issues pertaining to those topics – are not mere technicalities, they are the lynch-pins of a well-functioning constitutional law. Simply put, if Petitioners were right, every application of anti-discrimination law would be forced speech, in the sense that requiring a defendant to hire, feed, house, or employ an individual would be tantamount to a "compelled endorsement" of the proposition that persons who have that plaintiff's background characteristics should not be excluded from the opportunity in question on that basis.

Such a regime, in which all anti-discrimination law would arrive with a presumption of unconstitutionality, would be unacceptable in its own right, and, indeed, the very argument Petitioners advance has been presented to and explicitly rejected by this Court. The private school defendants in Runyon argued that requiring a black applicant's candidacy to be evaluated on race-neutral grounds would compromise their ability to teach students their views about the desirability of racial segregation.

This Court answered that:

> assum[ing] that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions[,] it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.

427 U.S. at 176; accord Roberts, 468 U.S. at 627 (observing that admission of women "requires no change in the Jaycees' creed of promoting the interests of young men"); see also Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376, 390 (1973) (contrasting First amendment protections for advertisements offering employment on a discriminatory basis and those which might express an opinion on the underlying wisdom or legality of the ordinance prohibiting discrimination).[10]

Indeed, even if Runyon were not specifically on point, the "Free Speech" analysis propounded by Petitioners could not prevail. It is a starting point of this Court's jurisprudence that requiring one who objects to federal taxation to pay his statutorily mandated share of taxes is not the same as forcing him to conform to the government's view as to the morality or legality of a graduated income tax, nor does it deprive him of the freedom to express that belief. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (Scalia, J., concurring) ("[V]irtually every law restricts conduct, and virtually any prohibited conduct

[10]There is no merit to distinguishing Runyon on the ground that the statute involved, 42 U.S.C. § 1981, was enacted pursuant to the extraordinary power conferred by Section 2 of the Thirteenth Amendment. The Section 2 enforcement authority, however, is only extraordinary relative to other powers delegated to Congress, i.e., enabling the federal government to regulate local matters that States can address as a routine exercise of their police powers.

can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition").[11]

B. Roberts – as Decided by This Court – Does Not Assist Petitioners

Petitioners also maintain that rights of "expressive association" are violated by New Jersey's law. According to Petitioners, the main vice of the decision below was in the New Jersey Supreme Court's determining for itself whether applying the Law Against Discrimination to Petitioners' policy would actually impair BSA's ability to carry out the expressive purposes for which its members have joined together. Petitioners contend that instead of determining independently what BSA's "message" was, the New Jersey courts should have deferred to Petitioners' representations concerning both the meaning of "their message" and the means chosen to transmit it, i.e., "quietly," through negative implications of affirmative commands, and through "role modeling."

Petitioners make only a half-hearted effort to argue that this Court's controlling case law requires, for as the New Jersey Supreme Court rightly perceived, Roberts and its progeny would be decided differently if "expressive association" claims were entitled to the sort of supine deference upon which Petitioners insist. If the Court had been required to accept as controlling an organization's explanation of its "message" -- including "teachings" unknown to the club's own membership – and if it were constrained to defer to the club's chosen "means"of

[11]Nor should the second error of the Hurley analogy be underestimated. To assume that an individual's "views and beliefs" – even on the issue of how people of his race, religion, or sexual orientation should be treated – can be inferred from his or her status as a member of a group would be to unlearn the lessons of this Court's modern anti-discrimination teaching. See J.E.B.; Castaneda v. Partida, 430 U.S. 482, 499-500 (1977).

expressing it – including through silence and "role modeling," then the assertions of the defendants in this Court's Rotary Club and Jaycees cases should have received a different reception. Just as BSA insists that its implicit "message" concerning sexuality must come from a non-homosexual, the Jaycees contended that their speech concerning the interests of young men would be heard differently if uttered by an organization comprised of men and women. See Roberts, 468 U.S. at 627.

And while Petitioners assert that the Court's inquiry was limited to scrutinizing defendant's means to their asserted ends, the Duarte decision, no less than the Supreme Court of New Jersey, inquired what the defendant's "basic" purposes were.[12]

If litigants were granted such boundless freedom to define "ends" and "means" in a manner that would make application of anti-discrimination laws unconstitutional, those statutes would loom as paper tigers. Only the most inept discriminator could not escape liability on "constitutional" grounds, i.e., by asserting that gender or racial difference was a facet of its "message" – if only a small and little-known component of it – and that this philosophy was conveyed by the race and gender of its membership. If Petitioners' "test" were the law, it would, as is claimed, Pet. Br. at 45, protect the power of the Women Anglers of Minnesota to exclude men – but it would also give that group a "constitutional right" to exclude African Americans, disabled people, or Catholics, and it would allow the National Association of Coin Dealers or Cat Fanciers, not to mention the Jaycees, to impose exactly those same restrictions. Whatever one might think of that result, it is surely not the Roberts rule.

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[12]Indeed, the concurring opinion in Roberts looked to the former name of the organization to detect its true purpose, see id. at 639 (O'Connor, J., concurring), an exercise presumably no less constitutionally delicate than the New Jersey Supreme Court's reading for itself the Boy Scout Manual.

But even in a regime that treated as conclusive BSA's contentions concerning its "teaching" concerning homosexuality, i.e., that it has sought to teach, albeit tacitly, that homosexuality is "unclean," BSA would be hard-pressed to explain how Dale's ability to convey that message is more compromised than that of a heterosexual who disagrees with it. Indeed, even where a court gives a party the sort of deference upon which BSA insists, it would be authorized to infer discrimination from the manifest inconsistency between the stated interest – intolerance of certain beliefs about moral "cleanliness" – and actions, i.e., excluding "known" homosexuals while continuing to welcome support of others, the New Jersey government, for example, who are undeniably committed to the view that exclusion of homosexuals is "bigotry."[13]

In fact, the fount of Petitioners's argument – the proposition that the judiciary has no business deciding whether an organization's expression of its message is impaired is itself a misstatement of governing law. Where, as here, there can be no serious claim that the government seeks to target the content of BSA's speech (or that of any other entity subject to the statute), see Roberts, 468 U.S. at 623, it is a mainstay of First Amendment analysis for courts to determine the extent to which a particular regulation impairs a speaker's ability to convey its message.[14] In Ward v. Rock Against Racism, 491 U.S. 781, 801

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[13]Petitioners argue that even if Dale could be acquitted of tacitly endorsing homosexuality, he could be convicted of the Boy Scout sin of hypocrisy and inconsistency – saying one thing while doing or believing otherwise. Pet. Br. at 4. If that were true, of course, Defendants do have an anti-gay policy, after all – because every non-"avowed" homosexual would be excludable as a hypocrite while each "known" one would be an apostate, while equally "inconsistent" non-gay troop sponsors would escape a comparable fate.

[14]There is no basis for suggesting that New Jersey's Law Against

(1989), for example, the Court considered whether the policy of controlling the mix had "a substantial deleterious effect on the ability of [plaintiff] performers to achieve the quality of sound they desired," and in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), the Court upheld a ban on camping in a public park, notwithstanding the recognized effect that would have on the composition of a political protest, see id., (noting that poor and homeless might not participate if not provided a place to sleep); See also Heffron v. Int'l Soc. For Krishna Consc., 452 U.S. 640 (1981).

In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and its progeny, the Court has undertaken the no less sensitive task of examining the content of a union's political speech to determine which of it can be said to be "germane" to the union's responsibilities as collective bargaining agent, and in Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 298-99 (1985), the Court declined to credit a religious ministry's contention that its marketplace activities were "churches in disguise -- vehicles for preaching and spreading the gospel," entitled to exemption from the Fair Labor Standards Act.. Cf. United Food & Commercial Workers v. Brown Group, Inc, 517 U.S. 544 (1996) (inquiring in associational standing case whether

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Discrimination was enacted with the intent of silencing those who speak out against homosexuality – or gender equality or religious tolerance; indeed, religious groups, who presumably are some of the loudest voices on that side of the issue are generally exempted from the law's coverage. If New Jersey had wanted to make trouble for those opposed to equal rights for homosexuals, it had many less conspicuous and more effective means at its disposal. See EEOC, 493 U.S. at 200 (observing that unavailability of funds would have far more serious limiting effect on university's protected freedom to decide "who will teach" than would alleged compromise of peer review process).

prosecuting litigation is "germane to an organization's purpose").[15]

III. The Court Should Not Reinterpret the Constitution so as to Broadly License Civic Groups to Discriminate

A. Constitutional Text, Structure, and History Do Not Support an Absolute Right to Exclude

It is a broad leap from recognizing, as does Amicus, the importance of the contribution that civic groups and associations make to insisting, as Petitioners and their supporters have, that this contribution entitles them to a special, constitutional immunity from anti-discrimination laws. As an initial matter, although the distinctive role played by clubs and associations is rightly lauded, the claim for a uniquely privileged place in American constitutional law is not a strong one. However potent an impression associational activities may have left on visiting French aristocrats, the Framers of the First Amendment saw fit to single out two other institutions – the press and religion – for special textual mention, and the Court's decision's concerning these groups' assertions of an absolute First Amendment right

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[15]On BSA's logic, the right approach in cases such as Abood would be to allow individuals who disapprove of collective bargaining in principle to opt out of all dues – or, at the least, to allow dissenters to define for themselves which expenses they believe to be "germane" and which ones are excessively "ideological."

Indeed, the approach taken in the concurring opinion in Roberts, which BSA and *amici* urge upon the Court, see infra, does not avoid these sorts of "entanglements." At the very best, that approach substitutes one set of sensitive constitutional judgments for another, conditioning as it does, "radically" different First Amendment protection on whether an institution's purposes are "predominantly" expressive. 468 U.S. at 638; cf. id. at 637 (acknowledging that the "considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are . . . fluid and somewhat uncertain").

not to associate must control any claim to preferred treatment for others. Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937), for example, rejected a news gathering institution's contention that an order requiring reinstatement of an editor was unconstitutional because the First Amendment conferred "absolute and unrestricted freedom to employ and to discharge those who. . . edit the news." Accord Hausch v. Donrey of Nevada, Inc., 833 F. Supp. 822 (D. Nev. 1993) (rejecting publisher's assertion that "if the United States Government, through the judiciary's application of Title VII, may exercise control over who the publisher may choose as editor or associate editor, then the Government is exercising control over the content of that publication").

The Court's ruling in cases involving education, which has also been held to implicate special First Amendment concerns, see Pierce v. Society of Sisters, 268 U.S. 510 (1925), is to similar effect. Thus, in Runyon, the Court held that neither the freedom to operate a private school and determine the substance of its curriculum, see Meyer v. Nebraska, 262 U.S. 390 (1923), nor the "right of parents to send their children to [that] particular private school," required an exemption from anti-discrimination laws with which the school and parents disagreed. See id. (Powell, J., concurring).

And in EEOC v. University of Pennsylvania, the Court affirmed that "academic freedom is a 'special concern of the First Amendment,'"but declined to re-write the rules of Title VII to accommodate a university employer. 493 U.S. at 193 (explaining that "[a]cceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers?"); see also Hishon, 467 U.S. at 78 ("Although we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' . . . [the defendant] has

not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits") (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

These decisions, which, no less than the case at bar, have the potential to affect the "voice" with which institutions with strong claims to special First Amendment protection speak on issues of public concern are not outliers. Rather, they represent specific application of the general rule that laws which incidentally or even disproportionately burden the press are not invalid on that ground. See generally Branzburg v. Hayes, 408 U.S. 665 (1972).[16]

The suggestion that the Court must choose between the benefits of a vital independent sector and enforcement of anti-discrimination laws suffers from a further defect: the assumption that there is no constitutionally meaningful difference between a "government takeover" and the limitations on the right to exclude that anti-discrimination laws entail.

As an initial matter, the absolute freedom that such arguments presuppose is not well supported in our constitutional tradition, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484,

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[16]Nor, it should be noted, is this a case where reasoning from constitutional text, structure, and precedent lead to an answer that is at odds with original intent. To the contrary, one prominent commentator concluded a survey of the subject by observing that

> [t]he Framers wanted to limit the influence of private associations (factions) . . .None of colonial charters or constitutions address the subject. The virgina Declaration of Rights does not preserve private associations. No state asked the First Congress to put anything about associations in the Bill of Rights – although there was a proposal on almost everything else one can imagine

Easterbrook, Implicit & Explicit Rights of Association, 10 HARV. J.L.PP. 92, 99 (1986).

517 (1996) (Scalia, J., concurring). Even where "distinctly private" clubs were involved, there are numerous early decisions upholding the judiciary's power to order reinstatement of a member who is expelled, based on the court's judgment that (1) the club had failed to follow its own rules; (2) that those rules were contrary to "natural justice"; or (3) that the decision to expel the member was "malicious." See Z. Chaffee. The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 992, 1014-15 (collecting cases); see also Easterbrook , 10 HARV. J. L.P.P. at 99 (noting that "[n]one of the history of the colonies hints at a general protection for private associations" and that the "climate of the Eighteenth and Nineteenth century exalted individual rather than associational freedoms").[17]

And while defendants have time and again cast anti-discrimination laws as a total usurpation, this Court's cases have long emphasized the extent to which laws forbidding decision makers from relying on particular characteristics leave intact important prerogatives. Thus, in the Associated Press case, it was observed that:

> The [NLRA] does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully

[17]These decisions often analogized the terms of membership to a contract, treating the asserted basis for exclusion as if it were a contractual term that was unenforceable, as contrary to public policy. Summarizing a number of cases in which expulsion was based on a member's views, Professor Chaffee proposed a rule not unlike the test applied in Roberts:

> courts should consider, on the one hand, the seriousness of the injury caused by expulsion and the importance of the [plaintiff's] right; and on the other hand, the desirability of giving full autonomy to the association and of permitting it to maintain the unimpaired loyalty of its members to the purposes for which it is obviously organized.

43 HARV. L. REV. at 1018.

> to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of [the complainant] to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

331 U.S. at 132-33. Accord Hishon, 467 U.S. at 78 (Title VII only requires that partnership candidate be considered on her individual merits); New York Club Ass'n; cf. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (rejecting assertion that "right to exclude" is sine qua non of property or free speech rights).

B. There is No Constitutional Warrant To License for "Non-Commercial" Discrimination

Citing the singular importance of civic participation, Petitioners(implicitly) and various of their *amici* (explicitly) also propose that the Constitution be construed as granting certain "non-commercial" entities absolute immunity from the strictures of anti-discrimination laws. See generally Roberts, 468 U.S. at 632-41 (O'Connor, J., concurring). While that proposal would spare the Court the need to revisit – and overturn -- key (i.e., "commercial") anti-discrimination precedents that Petitioners' arguments might otherwise undermine, it would not be sound constitutional law.

Even leaving aside the awkwardness of giving such entities greater First Amendment license to "creat[e] . . . a voice"

than is enjoyed by the press, see supra,[18] and its poor fit with precedent,[19] the proposal would suffer from other serious weaknesses. First, the commercial/non-commercial distinction is an unreliable proxy for the duration or intensity of any particular association. Although the relationship between fellow club members may be assumed to be less transitory than between the proprietor and a customer of a restaurant, movie theater or other paradigmatic "public accommodations," the contact between club members is by no means more intensive than between neighbors, see Jones v. Alfred O. Mayer, 392 U.S. 409 (1968), classmates, Runyon, or law partners, see Hishon. Nor can this Court's cases easily be read as allowing a "radical[]" distinction between the expressive rights of for-profit, as opposed to not-for-profit entities. First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978); see also Easterbrook, 10 HARV. J.L.P.P. at 98.

Similarly, the harm to the individual is by no means always lesser when "noncommercial," rather than economic, opportunity is what is denied. As Petitioners and their supporters have taken pains to point out – and Amicus readily agrees – civic involvements are an integral aspect of full citizenship and often reward their participants in ways more important than the narrowly mercenary. To deny individuals access to these

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[18]To the extent the difference is explained by the fact that newspaper publishing is a "business," it must contend with the principle that "if a newspaper's profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales" Pittsburgh Press, 413 U.S. 376, 384-85 (1973) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[19]The defendants in Roberts and Duarte,, non-profit associations dedicated to "fellowship for service," 481 U.S. at 547, were hardly quintessential commercial enterprises -- nor were the Appellants in Corsi or the schools in Runyon.

benefits for reasons unrelated to their personal talents, values, and potential contributions can cause both individual and societal harm.[20]

C. The Approach Embodied in New Jersey Law is a Sound One

Rather than rely on a distinction based on whether an entity's "predominant" purposes are commercial, New Jersey – and many other States – take a "functional" approach, whereby the obligation to refrain from discrimination attaches depends on the extent the entity can be said, objectively, to hold itself out as "public." See Roberts, 468 at 625; N.O.W. v. Little League Baseball, Inc., 67 N.J. 320 (1974), aff'g 127 N.J. 522, 531 (App. Div. 1974). Not only is such an approach broadly consistent with the common law, see Romer v. Evans, 517 U.S. 620, 629 (1996), but it gives groups substantial control as to whether they will operate truly privately or whether it will seek the benefits of more public membership solicitation, Cf. Roberts, 468 U.S. at 636 (O'Connor, J., concurring) ("An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas"); Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it"). Finally, such a rule protects against

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[20]Indeed, the only textual basis for drawing a constitutional distinction between entities that are engaged in commerce and those which are not can be found in Article I, which confers upon Congress authority to regulate commerce. See Katzenbach v. McClung, 379 U.S. 294, 300 (1964). But while congressional power to address private discrimination is rightly scrutinized for a nexus with commerce, the State police power need not be.

the particular "embarrassment and humiliation of being invited[,] . . .only to find [the] doors barred." Evans v. Ross, 57 N.J. Super. 233, 231 (App. Div. 1959).[21]

Conclusion

Because the New Jersey Supreme Court correctly applied this Court's teaching – and because Petitioners have advanced no sound basis for rewriting the law – the decision below should be affirmed.

Respectfully submitted,

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[21]Indeed, this basic recognition that a party should not "have it both ways"-- "public" for governmental benefits and "private" for resisting burdens -- largely answers Petitioners' insistence that it is perverse to exempt a vehemently anti-gay group from the prohibition on sexual orientation discrimination while"punishing" BSA (with a nondiscrimination obligation) for its relative circumspection. As this case well illustrates, the less loudly an organization declares its exclusionary character, the more likely that it will be treated as "public" in ways. that redound to its benefit There can be little doubt, for example, that a group with the avowed purpose of promoting anti-gay hostility would be less likely to be welcomed into New Jersey's schools, fire departments, and other governmental entities than are Petitioners.